

**Smith v Advance Auto Parts, Inc.**

2023 NY Slip Op 32529(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 190261/2016

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA

PART

13

Justice

X

INDEX NO.

190261/2016

CAROLINE SMITH, CAROLINE SMITH,

MOTION DATE

06/26/2023

Plaintiff,

MOTION SEQ. NO.

018

- v -

ADVANCE AUTO PARTS, INC., AIR & LIQUID SYSTEMS CORPORATION, ALCOA, INC., ALCO PRODUCTS, INC., ALPHA WIRE CORP., AMERICAN BILTRITE INC., AMERICAN INSULATED WIRE CORP., A.O. SMITH WATER PRODUCTS COMPANY, AMERICAN STANDARD, INC., ARMSTRONG INTERNATIONAL, INC., ARMSTRONG PUMPS, INC., ASBEKA INDUSTRIES, INC., AURORA PUMP COMPANY, A.W. CHESTERTON CO., INC., AWC 1997 CORP., BELDEN WIRE & CABLE CO., BORG WARNER CORPORATION, BURNHAM HOLDINGS, INC., BW/IP, INC., CARBORUNDUM INC., CARRIER CORPORATION, CBS CORPORATION, CCX, INC., CERTAINTED CORPORATION, CIRCUIT BREAKER SALES, INC., CLEAVER-BROOKS INC., COOPER INDUSTRIES INC., COURTER'S COMPANY, CRANE CO., CRANE PUMPS & SYSTEMS, INC., CYTEC INDUSTRIES INC., DANA CORPORATION, DEMING PUMPS, DUREZ CORPORATION, EATON ELECTRICAL, INC., ELECTRIC SWITCHBOARD CO., INC., ERICSSON, INC., FEDERAL PACIFIC ELECTRIC COMPANY, FEDERAL PACIFIC EQUIPMENT INC., FEDERAL PUMP COMPANY, FEDERAL PUMP CORPORATION, FISCHBACH & MOORE, INC., FMC CORPORATION, FLUOR CORPORATION, FLOWERVE CORPORATION, FORD MOTOR COMPANY, FORT KENT HOLDINGS, INC., FOSTER WHEELER, LLC, GARDNER DENVER, INC., GENERAL CABLE CORPORATION, GENERAL ELECTRIC COMPANY, GENERAL REFRATORIES CO., GENERAL WIRE & CABLE, GENERAL WIRE PRODUCTS, INC., GENUINE PARTS COMPANY, GEORGIA-PACIFIC LLC, GOULDS PUMPS INCORPORATED, GRAYBAR ELECTRIC COMPANY INC., GRUNDFOS PUMPS CORPORATION, HATZEL & BUEHLER INC., HENRY VOGT MACHINE CO., HONEYWELL INTERNATIONAL, INC., HOWDEN BUFFALO, INC., HUBBELL POWER SYSTEMS INC., IMO INDUSTRIES, INC., INGERSOLL RAND COMPANY, J.H. FRANCE REFRATORIES CO., JOHNSON CONTROLS, INC., KAISER GYPSUM INC., KEYSpan ENERGY CORPORATION, KING INSULATION INC., LEVITON MANUFACTURING CO., LIGHTOLIER INC., METROPOLITAN INSURANCE COMPANY, MINE

DECISION + ORDER ON MOTION

SAFETY APPLIANCES COMPANY, NATIONAL GRID,  
 NATIONAL GRID GENERATOR, LLC, NATIONAL  
 LIGHTING COMPANY, O'CONNOR CONSTRUCTORS,  
 INC., PEERLESS ELECTRIC COMPANY, PEERLESS  
 INDUSTRIES, INC., PENT AIR PUMP GROUP,  
 INC., PFIZER INC., PLASTICS ENGINEERING COMPANY,  
 PRESCOLITE, INC., PROGRESS LIGHTING, INC., RILEY  
 POWER INC., ROCKBESTOS SUPRENANT CABLE  
 CORP., ROCKWELL AUTOMATION INC., RSCC WIRE &  
 CABLE, LLC, SCHNEIDER ELECTRIC CORP., SHELL OIL,  
 SIEMENS ENERGY & AUTOMATION, INC., SPIRAX  
 SARCO, INC., SQUARE D COMPANY, SPX COOLING  
 TECHNOLOGIES, INC., TACO, INC., THE FULTON  
 COMPANIES, THE OKONITE COMPANY, THE TRANE  
 COMPANY, THE WM POWELL COMPANY, THERMO  
 ELECTRIC CO., INC., TREADWELL CORPORATION,  
 TYCO FLOW CONTROL, INC., TYCO VALVES &  
 CONTROLS, INC., UNION CARBIDE CORP., UNITED  
 STATES STEEL CORPORATION, VELAN VALVE  
 CORPORATION, VICTOR WIRE & CABLE CORP., VIKING  
 PUMP CO., INC., WARREN PUMPS, WEIL MCLAIN,  
 YARWAY CORPORATION, YORK INDUSTRIES  
 INC., YORK INTERNATIONAL, YUBA HEAT TRANSFER,  
 LLC, AC LIGHTING & ELECTRICAL SUPPLIES,  
 LLC, COOPER CROUSE-HINDS, LLC; FOR ITS CHICO X  
 BRAND PRODUCTS, GEICO CORPORATION, MACY'S,  
 INC., SEARS ROEBUCK & COMPANY, GOULD  
 ELECTRONICS, INC. INDIVIDUALLY AND AS  
 SUCCESSOR IN INTEREST TO GOULD., INC., AS  
 SUCCESSOR IN INTEREST TO I-T-E IMPERIAL CORP  
 AND BULLDOG ELECTRIC PRODUCTS CO, EX-FM, INC.  
 FORMERLY KNOWN AS FISCHBACH AND MOORE,  
 INCORPORATED, LONG ISLAND POWER AUTHORITY,  
 LONG ISLAND LIGHTING COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 018) 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 821, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 864, 868, 888, 900

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendant National Grid Generation LLC d/b/a National Grid, incorrectly sued herein as KeySpan Energy Corporation, National Grid, and National Grid Generator's (hereinafter referred to as "National Grid") motion for conditional summary judgment on its cross-claim for contractual indemnification is hereby denied without prejudice to re-file for the reasons set forth below.

Here, defendant National Grid moves for conditional summary judgment arguing that, as successor to defendant Long Island Lighting Company (hereinafter referred to as “LILCO”), conditional summary judgment should be granted against defendant O’Connor Constructors, Inc. on defendant National Grid’s cross-claim for contractual indemnification. Defendant O’Connor Constructors, Inc. opposes and defendant National Grid replies.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1<sup>st</sup> Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1<sup>st</sup> Dep’t 1990). The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

Preliminarily, the Court notes that defendant National Grid proffers the Decision and Order of Honorable Martin Shulman, dated March 13, 2015, in *North v Air & Liquid Systems Corp., et. al.*, Index No. 190114/2013, which granted the portion of defendant National Grid's post-verdict motion for contractual indemnification against O'Connor Constructors, Inc. Judge Shulman's March 13, 2015 decision was appealed and affirmed by the Appellate Division, First Department, on June 28, 2016. *See In Re New York City Asbestos Litigation, North v Air & Liquid Sys. Corp.*, 142 AD3d 408 (1<sup>st</sup> Dep't 2016). Such decisions, while addressing an identical indemnification provision, were decided post-verdict after all of the facts were determined at trial.


Here, issues of fact exist as to whether the indemnification clause in the August 9, 1965 agreement between defendant LILCO and defendant O'Connor Constructors, Inc. is triggered by the undisputed facts in this action. The Court notes that the August 9, 1965 agreement was amended on March 1, 1966 to include work to be done in Unit 2 of the Northport Power Station. Here, issues of fact exist regarding defendants' work and plaintiff's exposure to asbestos precluding summary judgment at this time. As such, defendant National Grid's instant motion for conditional summary judgment is hereby denied without prejudice to re-file after verdict or settlement of this action.

Accordingly, it is

ORDERED that defendant National Grid's motion for summary judgment seeking contractual indemnification from defendant O'Connor Constructors, Inc. is denied in its entirety, without prejudice to re-file within 45 days after a verdict or settlement of this action; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

7/21/2023		
DATE		ADAM SILVERA, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE